No. 11948

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ANDREW L. JOHNSON and
CHARLES W. GUNSTONE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

FRANK PELLEGRINI
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
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BRIEF OF APPELLEE

I. STATEMENT OF THE CASE

Appellants, owners of tide lands developed as commercial clam beds located on Port Discovery Bay, Washington, bring this action to recover for alleged loss of profits because of the alleged pollution of the waters of the Bay and the entry of an order by the

State of Washington prohibiting the taking of clams from the beds for sale to the public for the period December 10, 1945 to March 31, 1946. The complaint (R. 2-5) alleges that the waters of the Bay were polluted by naval vessels anchored therein and as a result of this pollution the State's prohibitory order was issued and the loss sustained.

Jurisdiction of the cause is predicated on the Federal Tort Claims Act, hereinafter referred to as the "Act" (Sec. 931, et seq., Title 28, U.S.C.) (R. 2).

Appellee moved to dismiss the action on the ground the lower court did not have jurisdiction of the claim (R. 6) in that Section 421(j) of the Act (Sec. 943(j), Title 28, U.S.C.) specifically exempts claims "arising out of combatant activities of the military or naval forces or Coast Guard during time of war". In support of the motion to dismiss, appellee filed affidavits of three naval officers, Lt. Col. Wehr, U.S.N. (R. 7-16), Commander W. F. Lally, U.S.N.R. (R. 17-20) and Commander Samuel J. Reiffel, U.S.N.R. (R. 21-31). The facts alleged in the said affidavits were not contradicted by appellants. The affidavits may be summarized as follows:

From time to time during the period December 10, 1945 to March 31, 1946, sixteen Naval Ammunition Ships were anchored in Port Discovery Bay. The

vessels were regularly commissioned naval vessels mannned by naval personnel (R. 14-16) and attached to and operated as components of the United States naval combat task forces in the Western Pacific. Their duty was to rearm naval combat vessels operating at sea in the forward combat areas and in enemy waters (R. 10, 17, 21). They were "floating magazines" so loaded that combat ships could procure any type or quantity of "live" ammunition required to rearm without disturbing the remaining cargo and with a minimum loss of time (R. 10). This method of loading referred to in the Navy as "fleet issue" enabled the said ammunition vessels to rearm combat vessels at sea or at anchorage and without the necessity of proceeding to port. Consequently, a naval task force was able to stay at sea and continue combat operations in enemy waters for long periods of time (R. 9). All of the said ammunition vessels were directly connected with the successful operations of the Pacific Fleet of the United States Navy in the Pacific (R. 12). On the cessation of the actual fighting in the Pacific, August 14, 1945, the Navy Department was faced with the problem of returning large quantities of unused ammunition to the United States (R. 10). A substantial portion of the ammunition had to be returned by Merchant vessels operated by the War Shipping Administration (R. 10). Discharging fa-

cilities for ammunition (ammunition depots) in the United States were limited and it was imperative in order to avoid extra hazardous conditions in the harbors that the merchant vessels immediately discharge their cargos on arrival (R. 10-11). Consequently the sixteen naval vessels were placed in an ammunition "bank" in Port Discovery Bay until discharging facilities became available (R. 11) and pending a decision concerning where to dispose of their cargos of ammunition (R. 22). While held in the "bank", the vessels continued to be in the same physical conditions, fully able to perform the same type of mission as when engaged in operations in the Pacific. They were in all respects in a full condition of readiness as a "floating magazine" of the United States Navy (R. 13). The cargos of ammunition aboard the vessels were subsequently discharged at several different ports in the United States (R. 19, 23).

During all of the time the naval vessels were held in Port Discovery Bay, the United States was at war and hostilities had not terminated. Res. Dec. 8, 1941, 55 Stat. 795, et seq. (App. Prec. Section 1, Note, Title 50, U.S.C.). In fact, the termination of hostilities was not proclaimed by the President until December 31, 1946 (Proclamation 2714, Dec. 31, 1946,

12, F. R. 1) (U. S. Code Congressional Service, 80th Congress, First Session, 1947, page 1895).

The District Judge granted the motion to dismiss.

II. ARGUMENT

1. AN ACT OF CONGRESS WAIVING SOVEREIGN IMMUNITY MUST BE STRICTLY INTERPRETED FAVORABLY TO THE GOVERNMENT.

The Federal Tort Claims Act was approved August 2, 1946 and amended on August 1, 1947. We are not here concerned with the amendment.

Subchapter I of the Act (Secs. 921-922, T. 28, U.S.C.) provides for the administrative compromise of a tort claim not exceeding $1,000.00 by the head of the Administrative Agency concerned.

Subchapter II of the Act provides for suits on tort claims against the United States. By Section 410(a) (Sec. 931, T. 28, U.S.C.), exclusive jurisdiction is conferred on the United States District Court for the District wherein the plaintiff is a resident or the act or omission complained of occurred, sitting without a jury, "to hear, determine, and render judgment on any claim against the United States, for

money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages:"

Subsection (a) further provides that in death cases, notwithstanding the law of the place where the act or omission occurred, the United States shall be liable only for compensatory damages and provides for the allowance of costs except that such costs shall not include attorneys' fees.

Subsection (b), Section 410, provides that a judgment against the United States shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee

whose act or omission gave rise to the claim; that if a claim is presented to a Federal agency pursuant to Subchapter I, an action cannot be maintained on the claim unless the Federal Agency involved has made a final disposition of the claim or the claimant has upon fifteen days' notice given in writing, withdrawn the claim from consideration by the agency. It further limits the amount of the claim under Subchapter I to the amount of the claim presented to the agency except where the increased amount is shown to be based on newly discovered evidence not reasonably discoverable at the time of the presentation of the claim, or upon evidence of intervening facts relating to the amount and specifically provides that disposition of any claim by an agency shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

Section 411 (Sec. 932, T. 28, U.S.C.) provides that forms of process, pleadings, practice and procedures shall be in accordance with the Supreme Court Rules of Civil Procedure and the same provisions for counterclaims set-off, for interest on judgment, and for payment of judgment shall be applicable as in cases brought in United States District Courts under Section 41(20), 250(1), (2), 251, 254, 257, 258, 287, 289, 292, 761-765 under Title 28.

A review of final judgments in District Courts is provided for in Section 412, (Sec. 933, T. 28, U.S.C.). Appeals may be taken to the Circuit Court of Appeals or to the Court of Claims. Sections 346 and 347 of Title 28, are made applicable in proceedings in the Circuit Court of Appeals and in the Court of Claims to the same extent as to cases in a Circuit Court of Appeals therein referred to.

Section 413 (Sec. 934, T. 28, U.S.C.) gives the Attorney General the authority to compromise and settle claims with the approval of the court in which the suit is pending. The terms "Federal agency" "employee of the Government" and "acting within the scope of his office or employment" are defined in Section 402 (Subchapter III (Sec. 941, T. 28, U.S.C.).

Section 420 (Sec. 942, T. 28, U.S.C.) limits claims cognizable under the Act to one year after accrual of the claim or to one year after August 2, 1946, whichever is later. The limitation is applicable to claims presented to a Federal agency and actions instituted in District Courts. However, in the event a claim not exceeding $1000.00 is presented to a Federal agency, the time to institute suit is extended for a period of six months from the date of mailing the notice to the claimant by the agency as to the final disposition of the claim or from the date of the with-

drawal of the claim from the agency pursuant to Section 410.

Section 421 (Sec. 943, T. 28, U.S.C.) specifically exempts twelve classes of claims from the Tort Claims Act. The section is as follows:

"The provisions of this chapter shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, or 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act of omission of any employee of the Government in administering the provisions of sections 1-38 of Appendix to Title 50.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim rising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority."

Section 422 (Sec. 944, T. 28, U.S.C.) provides for the allowance of reasonable attorneys' fees out of the amount of the recovery and makes it a misdemeanor for an attorney to charge a fee in excess of the allowable amount.

Section 423 (Sec. 945, T. 28, U.S.C.), provides that the remedy provided by the Act shall be exclusive as to all claims cognizable under the Act.

Section 424(a) (Note under Sec. 921, T. 28, U.S.C.) repeals all provisions of law authorizing any

Federal agency to consider and compromise claims on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.

Subsection (b) of Section 424 (Sec. 946, T. 28, U.S.C.) provides that nothing contained in the Act shall be deemed to repeal any provision of law authorizing any Federal agency to consider and compromise claims on account of damage to or loss of property or on account of personal injury or death in cases in which such damage, loss, injury or death was not caused by any negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment or any other claim not cognizable under Subchapter I of the Act.

The Act is a comprehensive plan waiving the sovereign immunity of the Government. As such, it is in accord with the modern trend of Congressional legislation to abolish the doctrine "the King can do no wrong", (Tucker Act, Suits in Admiralty Act, Public Vessels Act) and a desire of Congress to free itself from the ever-increasing burden of considering private claim bills. In Section 410, Congress uses broad

and general terms. But Congress, further recognizing that the essential activities of many of the Federal Departments, particularly the War, Navy and Coast Guard, would necessarily result in a large volume of litigation, in Section 421, circumscribed in very important respects, this broad grant. Among the classes of claims abolished by the exemption section are those claims arising out of the combatant activities of the military or naval forces during time of war (Sec. 421(j)).

The Act being a relinquishment of sovereign immunity involving cases where the suit is directly against the Government must be strictly interpreted. *Schillinger v. United States*, 155 U. S. 163, 166; *Eastern Transportation Company v. United States*, 272 U. S. 675, 686; *United States v. Michel*, 282 U. S. 656; *Klamath Indians v. United States*, 296 U. S. 244, 250; *United States v. Sherwood*, 312 U. S. 584; *Wallace v. United States*, 142 F. (2d) 240, (C.C.A. 2).

Commenting on the Tucker Act, the Supreme Court in *United States v. Sherwood*, supra, said:

> "The Act must be interpreted in the light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of sovereign immunity, must be strictly interpreted."

The Second Circuit Court in *Wallace v. United States*, supra, tersely stated the general principle that statutes by which the United States yields its immunity from suit must be literally and narrowly construed.

2. CONGRESS INTENDED THAT THE MILITARY AND THE NAVAL DEPARTMENTS OPERATE IN TIME OF WAR UNHAMPERED BY THE THREAT OF DAMAGE SUITS.

In further determining Congress's intention in including subsection (j) in the exemption provisions of the Act, consideration must be given to the express desire of Congress to immunize from threat of damage suits certain activities of the United States which should, in their very nature, operate unhampered. Sen. Rep. No. 1400, 79th Congress, Second Sess. (1946) p. 3. Hearings before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Congress, Second Sess. (1942) 44, 45. See also 35 Georgetown Law Review 53.

That the Navy Department be allowed to operate unhampered and without the threat of damage suits in disposing of such dangerous materials as "live" ammunition immediately following the cessa-

tion of actual hostilities is self-evident. Clearly, this was the type of an activity which Congress had in mind when it expressed its desire that certain essential activities of the Government be allowed to operate immunized from threat of lawsuit.

3. THE ACTS HERE COMPLAINED OF AROSE OUT OF COMBATANT ACTIVITIES.

Applying the rule of strict interpretation and narrow construction to the language used by Congress in the exemption, construing the words in their commonly accepted sense and most favorably to the Government, it is apparent that the contentions made by the appellants that the acts complained of by them did not arise during the course of "actual combat" (page 6, Appellant's Brief) or from an "act of battle" (page 12, Appellant's Brief) are not warranted. Appellants arrive at their conclusion by separately defining the phrase "combatant activities", completely ignoring the qualifying words "arising out of". They argue that because the naval ammunition vessels (floating magazines) were removed from the scene of combat the acts did not constitute combatant activities and since the vessels were not engaged in combat, the exemption cannot apply.

As previously stated, this contention ignores the

qualifying words "arising out of". Under the uncontradicted facts as set forth in the affidavits in support of the motion to dismiss there can be no question that the instant claim arises out of the combatant activities of the naval forces. The voyage or the task assigned to these naval ammunition ships was not completed. They had been engaged for long periods of time in operations in enemy waters in forward areas supplying and rearming the combat vessels of the task forces of the Pacific Fleet at sea, so that those vessels could continuously maintain operations against the enemy.

As stated by the District Judge in his decision on the motion to dismiss (R. 33):

> "Were it not for the supporting services, such as supply ships and ammunition carriers, the battle could not last long. And as long as there is any necessity for obtaining an unbroken line of ammunition supplies to the war combat vessels, and a ship such as those ships named were so enengaged in supplying that ammunition, the Court has no alternative other than to find that such activity of the supplying vessel, * * * is engaged in combatant service within the statutory exemption of combatant activities respecting which the Government has not consented to be sued."

Appellants find comfort in the fact that the naval ammunition ships were waiting to discharge their

cargos. This argument is unsound. Clearly, the vessels had been engaged in combatant activities. Their character as supporting supply vessels in those activities was not lost under the circumstances of this case for several reasons. A state of war still existed. The cessation of hostilities had not been declared by the President. The Navy was still faced with the task of keeping its "powder dry" and its "guns cocked". A large quantity of ammunition of use to the naval forces had to be returned. The mission of the ammunition vessels was not completed until their cargos were returned and safely stowed. The facilities at which the hazardous ammunition cargos could be discharged were extremely limited. The normal hazards arising out of handling their cargos of "live" ammunition were great. Because of the limited facilities, an extra-hazardous condition in the harbors of the United States existed. The Navy was faced with the grave problem of protecting life and property in the harbor areas. The only way this purpose could be accomplished was to place the vessels in anchorages where loss of life or damage to property would be greatly minimized. Port Discovery Bay was such an anchorage.

To say that these conditions did not arise out of combatant activities is to belie the English language.

If it had not been for the war, the necessity of supplying ships through the medium of these vessels and the resulting necessity of returning the ammunition for future use, particularly in the times of stress under which the United States now finds itself, then it would not have been necessary for these vessels to have been held in Port Discovery Bay. Clearly, under the uncontradicted facts set forth in the affidavits, the act of the Navy Department in establishing an explosive anchorage in Port Discovery Bay was a necessity dictated by and arising from the combatant activities of the naval forces.

Further, the vessels, while at anchorage in Port Discovery Bay, were in full readiness to sail at a moment's notice if required to enforce the surrender of Japan or for any other combat purpose. They were and remained component parts of the Pacific Fleet of the United States Navy which was at that time engaged in enforcing the surrender and policing the many far-flung danger points in the Western Pacific and along the coast of Asia.

4. THE ACTS HEREIN OCCURRED DURING TIME OF WAR.

Under the doctrine of literal interpretation and narrow construction, the meaning of the phrase "dur-

ing time of war" is self-evident (*Wallace v. United States*, supra). It is admitted that the United States was in a state of war in 1945 and 1946 and is still in a state of war. In fact, in 1945 until December 31, 1946, when the President terminated hostilities by proclamation, we were technically in a state of hostilities.

It must be conceded that Congress in adopting the phrase "during time of war" had in mind the rule that until a peace treaty is signed, the nation continues to be engaged in war. To say that Congress did not consider the full meaning of the phrase in adopting the language used by it would not be logical.

The words "time of war" cannot be separated from the context of all of the language used by Congress in drafting the exception. *Eastern Transportation Co. v. United States*, supra. This language is "Claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war." As repeatedly stated by us, there can be no doubt that the acts complained of arose out of those circumstances.

Further, to say that it was Congress's intention to limit the words "during time of war" to time of actual combat, as contended for by appellants is not warranted. The words must be interpreted in the

light of the function they were designed to accomplish, in this case, to allow the Navy, without fear of lawsuits to return the ammunition ships recently engaged in actual combatant activities to their home ports and there to safely unload their cargos without unnecessarily endangering life and property.

Appellants cite several cases involving litigation interpreting the phrase "time of war" as applied to contracts between private parties and other cases interpreting similar terms. Each of the cited cases must be read in the light of its particular facts and the purpose to be accomplished. So read, none of them appear to be of any value in determining the instant question. In this connection the following language in *State ex rel Peter v. Listman*, 157 Wash. 229, 288 Pac. 913, cited by appellants is apropos:

> "In this respect words in a given setting and for a particular purpose may mean and often must be considered to mean a different thing than what they do in some other setting."

III. CONCLUSION

It is submitted that under the admitted facts of this case, the claim arises "out of the combatant activities of the * * * naval forces * * * during time of war", and the District Court does not have jurisdiction to entertain the action. The order of the Dismissal should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

FRANK PELLEGRINI
Assistant United States Attorney